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Supreme Court of the United States,

OCTOBER TERM, 1938

No. 252

JOSEPH S. FINCH & COMPANY, THE OLD QUAKER COMPANY, and SCHENLEY DISTRIBUTORS, INC.,

Appellants,

vs.

ROY McKITTRICK, Attorney General of the State of Missouri, et al.

No. 253

BEN BURK, INC.

Appellant,

vs.

ROY McKITTRICK, Attorney General of the State of Missouri, et al.

No. 254

JOSEPH E. SEAGRAM & SONS, INCORPORATED, and SEAGRAM-DISTILLERS CORPORATION,

Appellants,

vs.

ROY McKITTRICK, Attorney General of the State of Missouri, et al.

No. 255

HINRICHS DISTILLED PRODUCTS,

Appellant,

vs.

ROY McKITTRICK, Attorney General of the State of Missouri, et al.

No. 256

ARROW DISTILLERIES, INC.

Appellant,

vs.

ROY McKITTRICK, Attorney General of the State of Missouri, et al.

APPENDIX TO APPELLANTS' BRIEF

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APPENDIX A

CONGRESSIONAL DEBATE
on the
Submission of the Twenty-first Amendment

The Twenty-first Amendment became a part of the Constitution of the United States through the ratification of Senate Joint Resolution No. 211 of the 72nd Congress, Second Session.

The original form of this Resolution, introduced by Senator Blaine and referred to the Senate's Committee on the Judiciary on December 6, 1932, was as follows:

"ARTICLE—

"*Section 1.* The Eighteenth article of Amendment of the Constitution of the United States is hereby amended to read as follows:

"'ARTICLE XVIII

"'*Section 1.* The provisions of clause 3 of Section 8 of Article I of the Constitution, vesting in the Congress the power to regulate commerce with foreign nations and among the several States and with the Indian tribes, shall not be construed to confer upon the Congress the power to authorize the transportation or importation into any State or Territory of the United States for use therein of intoxicating liquors for beverage or other purposes within the State or Territory if the laws in force therein prohibit such transportation or importation; and any such transportation or importation of intoxicating liquors into any State or Territory for use therein in violation of its laws is hereby prohibited. If any such transportation or importation of intoxicating liquors in violation of law is made, the liquors so transported or imported shall become subject to the laws of the State or Territory on arrival therein.

"'*Section 2.* The Congress shall have the power to enact laws in aid of the enforcement of, and not incon-

sistent with, the laws enacted by any State or Territory of the United States which has prohibited the transportation or importation of intoxicating liquors for beverage or other purposes into such State or Territory for use therein.' " (p. 65)*

1. *Prior Action in the House*

On the day before the introduction of Senator Blaine's Resolution, Representative Rainey had introduced in the House H. J. Res. 480, providing for straight repeal of the Eighteenth Amendment. This Resolution was not referred to a committee but was debated by the House under suspension of rules. In the course of the debate and in the extension of remarks, frequent objections were made upon the ground that it failed to contain any provision for the protection of States which wished to remain dry:

> MR. SNELL: I stated publicly many times during the campaign that I was in favor of returning the control of the liquor traffic to the States under certain restrictions: To guard against the saloon and protection for dry States. I have not changed my position. * * *
>
> This resolution is not as I would like it. It will be amended many times before it becomes a law; yet it does start legislation for the return of the control of liquor traffic to the individual States, which I favor, and personally I have decided to vote for it. (p. 8)

> MR. CHRISTOPHERSON: When the people come to think about this and to realize that we are submitting a resolution which will mean the return of the open saloon to a large area of our country and in no manner protects the dry States from importations from wet States, this amendment will fail of ratification. (p. 12)

> MR. BLANTON: If we repeal the Eighteenth Amendment, there are no safeguards that could be retained by the Government that would insure dry States from being overwhelmed with liquor brought across their borders. (p. 17)

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*All references are to the pages of 76 Congressional Record (72nd Congress, Second Session).

MR. EATON: The 1932 Republican platform expressly stated that the Republicans "did not favor a submission limited to the issue of retention or repeal," and that the people should have an opportunity to vote for the protection of States where prohibition may exist and safeguard against the return of the saloon. (p. 18)

MR. THATCHER: In the resolution there is no provision granting to the Federal Government the power to deal with the question of protection to the dry States. The existing interstate commerce clause of the Constitution is believed by many to be insufficient to afford to dry States the protective benefits which should be theirs in case there should be a repeal of the amendment.

The naked and unconditional repeal of the amendment will permit and invite the return of the saloon in the States which desire to be wet; and with the return of the saloon in those States the systematic invasion of the dry States by the saloon influences will immediately follow. (p. 18)

MR. RANKIN: In the first place, it does not give any assurance against the return of the saloon, as provided in both political platforms, nor does it make any provision for the protection of the dry States against the encroachments of the liquor traffic. (p. 19)

MR. PATMAN: It is contended that the Webb-Kenyon Act would protect the dry States. The Webb-Kenyon Act merely makes it a violation of the law for intoxicating liquors to be transported from a wet State into a dry State. The law would probably be obeyed by the railroads, express companies, and other common carriers but would be ignored by individuals desiring to violate the law. I remember when Texas was dry and there was a saloon in Monroe, La. Under the Webb-Kenyon Act the transportation companies would not transport intoxicating liquors into Texas from Louisiana; but individuals from Texas, in great numbers, when the roads were bad and the means of transportation not so convenient as to-day, would go there, obtain intoxicating liquors, and return to Texas with it. (p. 22)

MR. COOPER: While I pledged myself for resubmission of the Eighteenth Amendment, as provided for in the Republican Party platform, I can not support the resolution being considered by Congress to-day, as it does not contain the provisions in the plank of the Republican Party platform prohibiting the return of the saloon and protection to States that desire to remain dry. (p. 22)

MR. GLOVER: Mr. Speaker, I had hoped that when a resolution was introduced in this Congress it would be in proper form so as to protect the dry States * * *

The wording of the resolution now submitted is as follows: "The eighteenth article of amendment is hereby repealed." Not a word or a syllable in it to protect any State that did not want liquor sold in it. (p. 23)

MR. LEAVITT: I stated then that I would not oppose the submission of a proposed amendment to the Constitution to change the Eighteenth Amendment if it contained a guaranty against the return of the saloon and a provision to give protection to such States as should, by their own vote, desire to retain prohibition. (p. 24)

MR. WILLIAMSON: Can anyone doubt that a majority of this body would much prefer to submit the proposed repeal of the Eighteenth Amendment with some safeguards for those States that may choose to remain dry?

It may well be that constitutional prohibition is not the best solution, but I am confident that the people of my State do not expect or want me to vote for a proposition which will give them no protection whatever in case they should elect to retain their present State prohibition law. (p. 25)

Some of the Representatives who discussed the question of protection for dry States, although expressing their approval of granting such protection, were in favor of the Resolution in spite of its failure to carry any explicit provision in this respect. Mr. LaGuardia said:

"* * * Congress has the power to protect dry States. That power has been repeatedly asserted by Congress and upheld by the Supreme Court." (p. 10)

Mr. White stated that writing into the Constitution the provisions of the Webb-Kenyon Act would be improper and unnecessary, since they represented a type of specific regulation which should not be embodied in the fundamental law:

> "There are to-day Federal laws regulating interstate commerce of sufficient force to protect those States which would choose to retain prohibition under State legislation or State constitutional provision. These laws certainly demonstrate the sufficiency of the authority of Congress to make such laws. It is unnecessary to provide a power already possessed." (p. 32)

H. J. Res. 480 was defeated by a narrow margin (272 Yeas to 144 Nays) on December 5, 1932. (p. 13)

2. *Debate in the Senate*

Introducing S. J. Res. 211, Senator Blaine said:

> "The effect of the joint resolution is to effectuate a complete repeal of the Eighteenth Amendment and to take out of the Federal Constitution the power of Congress relating to prohibition, except in so far as the Congress may assist the several States which desire prohibition in the protection of those States." (p. 64)

Senator Blaine's Resolution was reported out of the Judiciary Committee on January 6, 1933, with Section 2 in the form in which it finally passed.

Before the debate on S. J. Res. 211 was resumed, two statements were read into the record which opposed the form of the Resolution as it had been amended by the Committee on the Judiciary. In both, opposition to Section 2 was mild, and based upon the belief that the Webb-Kenyon Act afforded dry States sufficient protection without any explicit provision in the Constitution embodying its substance. Both statements, moreover, indicated the belief that the terms of Section 2 were merely an attempt to restate the Webb-Kenyon Law as part of the Constitution and,

therefore, their authors found no serious objection to leaving Section 2 in since it seemed to provide a greater sense of security to dry States. Pertinent provisions of the statement by Jouett Shouse, President of the Association Against the Prohibition Amendment, follow:

"Those who believe in an orderly process of prohibition reform have no objection, in so far as I know, to affording every proper measure of security to States which do not want liquor sold within their borders. If to accomplish this purpose it were necessary that further constitutional power be given, there would be every justification for this portion of the resolution. As a matter of fact, however, the Supreme Court has upheld the right of Congress, as exemplified by the Webb-Kenyon law, to prevent the importation of liquor into any State where the State laws of such State prohibit such importation. As recently as last May in a unanimous opinion the Supreme Court declared that the Webb-Kenyon law has not been affected in even the most remote way by the adoption of the Eighteenth Amendment or the enactment of legislation interpretative thereof, and that if the Eighteenth Amendment should be repealed, the Webb-Kenyon Law would still stand in full force and effect.

"Even so authoritative an advocate of prohibition as Senator Borah, of Idaho, in the course of debate in the Senate on July 16 last, gave utterance to the following significant statement:

"'Congress has that power [to prevent shipment of alcoholic beverages into so-called dry States], or will have it just as soon as the Eighteenth Amendment shall be repealed. The provision adds nothing whatever to it. * * * Nothing in the decision relative to the Webb-Kenyon Act would in any way detract from that power as expressed in the interstate commerce clause.'

"It would thus appear that any further steps looking to the protection of dry States are wholly unnecessary and represent merely a repetition of what is already embodied in the organic law of the land. But if such dry States will have a greater sense of security by a repetition of provisions such as that under dis-

cussion; certainly there is no particular objection thereto." (p. 1622)

Similarly, pertinent provisions from the statement of Mr. R. H. Anderson, coauthor of the repeal plank in the Democratic platform, follow:

> "I have no particular objection to Section 2, which prohibits the transportation of liquor into dry States in violation of the laws thereof, although it is unnecessary, because Congress indisputably has that power anyhow. However, if the dry States wish it written into the Constitution any more plainly than it is already, I shall not protest." (p. 4001)

Senate debate on S. J. Res. 211 commenced on February 15, 1933, with Senator Blaine speaking for the Committee on the Judiciary. His remarks make it entirely clear that the Committee's only purpose, in including Section 2, was to insure the permanence of the Webb-Kenyon Act. In his statement, he repeatedly uses the words "dry States"; he does not refer to the problem of one wet State excluding the products of another wet State:

> "Then we have suggested and offered Section 2, which provides as follows:
>
> 'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof is hereby prohibited.'
>
> "Mr. President, in agreeing to that section I think the committee was unanimous that the language used would effectuate the purpose that is obviously designed by Section 2. It is claimed, however, and I think with some degree of assurance for the future, that Congress now has the power to pass laws to protect the so-called dry States in regulation of interstate commerce over intoxicating liquors. A great many laws on that subject have been enacted.
>
> "I will not review those laws in detail. First, however, we had what is known as the Wilson Law. That law was treated in the case of Rhodes v. Iowa (170 U. S. 412); but the Supreme Court in that case gave rather a restricted construction of the language used by the

Congress, and held that under the Wilson Act the interstate character attached to the liquor until it had actually been delivered to the consignee. In other words, the court held that the interstate-commerce clause—that is, the power of Congress to regulate interstate commerce—attached to that commodity not only before it entered the State but after it entered the State so long as it was in process of transportation either by rail, by express, or by any other method, until the commodity or the intoxicating liquor was in fact delivered to the consignee.

"Then came an amendment to the Wilson Act, known as the Webb-Kenyon Act. The Webb-Kenyon Act was interpreted by the Supreme Court of the United States in the case of Clark Distilling Co. v. Western Maryland Railway Co. (242 U. S. 311). The language of the Webb-Kenyon Act was designed to give the State in effect power of regulation over intoxicating liquor from the time it actually entered the confines of the State; and the Supreme Court held that it was following the doctrine laid down in the case of Rhodes against Iowa, and necessarily must follow that doctrine in order to sustain the decision it was making in the case of Clark against Maryland Railway Co. * * *

"Then, following the Webb-Kenyon Act, was the Reed 'bone dry' amendment. That went somewhat further. I need not discuss that. That amendment was sustained by the Supreme Court in the case of United States v. Hill (248 U. S. 420).

"In the case of Clark against Maryland Railway Co. there was a divided opinion. There has been a divided opinion in respect to the earlier cases, and that division of opinion seems to have come down to a very late day. So, to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line.

"Mr. President, the pending proposal will give the States that guarantee. When our Government was organized and the Constitution of the United States adopted, the States surrendered control over and regulation of interstate commerce. This proposal is restoring to the States, in effect, the right to regulate commerce respecting a single commodity—namely, in-

toxicating liquor. In other words, the State is not surrendering any power that it possesses, but rather, by reason of this provision, in effect acquires powers that it has not at this time.

"The committee felt that since the Congress had acted and had definitely legislated upon this question, while that legislation had been sustained by the Supreme Court, yet it was sustained by a divided court, and that we could well afford to guarantee to the so-called dry States the protection designed by Section 2.

"I am opposed to the dry States interfering with the so-called wet States in connection with this question of intoxicating liquors; and so, by the same token, I am willing to grant to the dry States full measure of protection, and thus prohibit the wet States from interfering in their internal affairs respecting the control of intoxicating liquors." (pp. 4140-4141)

Then came a motion by Senator Robinson to strike Section 2. Senator Borah was the chief speaker on this motion. He opposed it on the ground that the dry States ought to have permanent protection. He admitted that, under the present decisions, the Webb-Kenyon Act was constitutional, but feared that it might later be held unconstitutional or that it might be repealed. He discussed at some length the various Supreme Court decisions dealing with liquor in interstate commerce, pointing out that a division of opinion had long existed on the question, and that the Webb-Kenyon Act itself was sustained by a divided Court. His conclusion was that constitutional doubt still existed as to the Act and that efforts to repeal it were likely to be numerous:

"I look upon this provision of the amendment as vital. It does not seem to me that we can afford to strip the amendment of all effort to protect the dry States. Indeed, if I understand the two platforms, that is a part of the pledge of the platforms. While perhaps that is not controlling, it has been emphasized to-day to a considerable extent, and perhaps some would feel that they should be bound by it. I do not cite it, how-

ever, as binding myself.

"Mr. President, it has been said that the Webb-Kenyon Act is a sufficient protection to the dry States. The Webb-Kenyon Act was sustained by the Supreme Court of the United States by a divided court. The President of the United States—President Taft, who was afterwards Chief Justice—vetoed it on the ground that it was unconstitutional. The Attorney General of the United States rendered an opinion to the effect that it was unconstitutional. Elihu Root, when in the Senate, argued that it was unconstitutional. Mr. Justice Sutherland, who is now upon the Supreme Bench, argued before the Senate that it was unconstitutional. Therefore, Mr. President, we are turning the dry States over for protection to a law which is still of doubtful constitutionality and which, as it was upheld by a divided court, might very well be held unconstitutional upon a re-presentation of it. Secondly, we are asking the dry States to rely upon the Congress of the United States to maintain indefinitely the Webb-Kenyon Law.

"It will be recalled that at the time the decision of the Supreme Court was made with reference to the Webb-Kenyon Act immediately thereafter there began a campaign upon the part of those interested in the liquor traffic to secure one of two things—either a repeal of the Webb-Kenyon Act by act of Congress or a reconsideration in the court. Thus, at the time of the adoption of the Eighteenth Amendment, that was an unsettled problem. It had not become, and never has become—except in the sense that now, since the adoption of the Eighteenth Amendment, it has not been contested as it otherwise would have been—it never has become a settled policy of the Government or a settled policy of the Congress and, it seems to me, could not be accepted as a sufficient protection to the dry States.

"Mr. President, I want to go back a little in the discussion of this matter to the history of the fight of the dry States to remain dry and be protected. * * *

"While it is not directly on the point, I will ask Senators to bear in mind that for that length of time the Supreme Court of the United States sustained the Taney decision, which makes me rather uneasy about leaving the Webb-Kenyon Act to the protection of the

Supreme Court of the United States, because in 1888 they wiped out the Taney decision and established a new doctrine. * * *

"Therefore, if we are to have what we are now promised, local self-government, State rights, the right of the people of the respective States to adopt and enjoy their own policies, we must have some other method, some other provisions of the Constitution, than those which existed prior to the adoption of the Eighteenth Amendment.

"All this was sought to be remedied by the Webb-Kenyon Act, and I am very glad indeed the able Senator from Arkansas has seen fit to recognize the justice and fairness to the States of incorporating it permanently in the Constitution of the United States." (p. 4170-4172)

During the course of Senator Borah's discussion, parts of which are quoted above, Senator Robinson withdrew his motion to strike Section 2. In doing so, both he (Senator Robinson) and Senator Wagner expressed their concurrence in the views of Senator Borah:

MR. WAGNER: In view of the inquiry made, I may say to the Senator that I have made a study of the history of these decisions to which he has been referring, and it is on account of those decisions, so far as I am concerned, that if the dry States want additional assurance that they will be protected I shall have no objection.

MR. ROBINSON of Arkansas: Mr. President, I had that thought myself. I do not wish to ask the Senate to put itself in the position of denying any measure of protection to dry territory. (p. 4171)

Mr. Walsh of Massachusetts similarly recognized that the effect of Section 2 was merely to embody the Webb-Kenyon Act in permanent form, and opposed the Resolution mainly for that reason. His views are expressed in an editorial which he caused to be inserted in the Record:

"The drys protested that this would leave the dry States without protection against the States which

should legalize alcoholic beverages. Thereupon the committee, ignoring the existence of the Webb-Kenyon Act which gives this 'protection' added another clause, which was not a constitutional enactment but simple Federal legislation, prohibiting the transportation or importation of alcoholic liquors from wet to dry States. Thus at the outset of its work the committee authorized a Federal control, which is the very source of the evils of which the country is complaining, and imbedded in the Constitution, which should be a statement of fundamental principles in government, an offensive form of sumptuary legislation." (p. 4176)

This is, in substance, the view expressed in the statements of Mr. R. H. Anderson and Jouett Shouse, quoted above, which had also been inserted in the record at the request of Senator Walsh.

After Senator Robinson's motion to strike Section 2 had been withdrawn, Senator Glass brought up S. J. Res. 202 as a substitute for S. J. Res. 211. The text of Section 1 of S. J. Res. 202 follows:

"ARTICLE—

"*Section 1.* Article XVIII of the amendments to this Constitution is hereby repealed. The sale of intoxicating liquors within the United States or any territory subject to the jurisdiction thereof for consumption at the place of sale (commonly known as a saloon), and the transportation of intoxicating liquors into any State, Territory, District, or possession of the United States in which the manufacture, sale, and transportation of intoxicating liquors are prohibited by law, are hereby prohibited. The Congress and the several States, Territories, and possessions shall have concurrent power to enforce this article by appropriate legislation." (p. 4229)

The first objection made to this Resolution was on the ground that the portion prohibiting the movement of liquor into the dry States was unnecessary because such prohibition was presently within the power of Congress without

constitutional amendment (p. 4219).

Thereupon, Senator Walsh of Montana undertook to explain the purpose of Section 2 of S. J. Res. 211:

"I wish to say a word, in view of what has just been stated by the Senator from Florida in relation to the second paragraph of the joint resolution as tendered by the committee.

"It is true that the original Constitution authorizes Congress to prohibit the transfer of intoxicating liquors in interstate commerce. It is held, however, that that authority simply indicates the intention to have commerce free except as Congress may otherwise direct. It has been held that under the existing Constitution the right obtains on the part of any citizen to pass his goods into another State, and they remain under the protection of the Federal Constitution until they actually reach the hands of the consignee; so that they can not be stopped at the State line nor there fall under the jurisdiction of the State authorities, but the goods will not fall under the jurisdiction of the State authorities until they actually get into the possession of the consignee who may live in the center of the State. Meanwhile all manner of opportunity is afforded for the diversion of the intoxicating liquors from the consignee to whom they are addressed. Likewise, even then, the intoxicating liquor is protected by the commerce clause; if it remains on the siding in the car of the transportation company, it still remains under that protection, and if it goes into a warehouse belonging to the transportation company it remains under the protection of the Federal statute, and is immune from any control by State statutes until it actually reaches the possession of the consignee. The purpose of the provision in the resolution reported by the committee was to make the intoxicating liquor subject to the laws of the State once it passed the State line and before it gets into the hands of the consignee as well as thereafter. It was so decided in a case reported in One Hundred and Seventieth United States Reports, with which, I think, the profession generally is not particularly familiar." (p. 4219)

Senator Glass argued that his Resolution had the same effect; but in so doing said:

> "Mr. President, in my own interpretation of the resolution as I have presented it, there can be no consignee of intoxicating liquors in a dry State. Liquors may be shipped across a State in interstate commerce from one wet State to another wet State, but the resolution as I have drafted it prohibits the shipment of intoxicating liquors into a State whose laws prohibit the manufacture, sale, or transportation of liquors. So I have met the objection that we are undertaking to interfere with interstate commerce as between States which authorize the manufacture, transportation, and sale of liquors; but there can be no consignee in dry territory under the terms of my proposed amendment to the Constitution." (p. 4219)

Thereafter the Senator did not press the matter, but immediately dropped the subject and turned to the discussion of the return of the saloon.

The only other hint of Congressional recognition of any possible effect of the proposed amendment upon the traffic in intoxicating liquors from one wet State into another wet State is to be found in the comments of Representative Lea made during an extension of remarks on an appropriation bill shortly after the Senate Judiciary Committee had reported out S. J. Res. 211, as amended, and before the Resolution was officially before the House.

> "In view of the fact that Congress has authority, regardless of the Eighteenth Amendment, to prevent the interstate shipment of intoxicating liquor in violation of State laws, the provision of the Senate amendment 'prohibiting' such shipment is perhaps not of great consequence. * * *
>
> "The proposal to prohibit importations to the States in violation of their laws is illogical, even though unimportant in its practical effects. * * * Under this color of constitutional sanction a State might pass a law to interfere with legitimate interstate shipments. No one could measure the responsibility the Federal

Government would thus assume. No one could anticipate the many varied, and perhaps unwise, provisions that might be written by the various States of the country.

"That proposal, on principle, is the extreme of State rights." (p. 2776)

In the course of the discussion which followed Senator Glass' remarks, Senator Reed expressed a preference for the phraseology of Section 2 of S. J. Res. 211 as distinguished from the words in Senator Glass' Resolution (p. 4220). He wished, therefore, merely to combine the prohibition against the return of the saloon with Section 2 of S. J. Res. 211. Senator Glass, opposing the change suggested, did not point to any distinction between the language of his Resolution regarding interstate transportation of liquor and the language of Section 2 of S. J. Res. 211 (p. 4220).

The following colloquy between Senator Swanson and Senator Robinson of Arkansas is further illuminating on the effect of Section 2:

MR. SWANSON: Of course, my vote on the various amendments and substitutes will be dependent upon the issues involved. I have a great regard, as have the people of Virginia, for the judgment of my colleague, the junior Senator from Virginia [Mr. Glass], but as I understand Section 2 as adopted last night, it prohibits the transportation and use of any intoxicating liquors in a State, Territory, or possession of the United States that prohibits such transportation and use by its own laws. Is that true?

MR. ROBINSON of Arkansas: That is entirely true.

MR. SWANSON: As I understand, if the sale of liquor and saloons were to be prohibited by the State of Virginia or the State of Pennsylvania or any other State in the Union, Section 2, as adopted, would allow the Federal Government to prevent the transportation and use of intoxicating liquors within that State. Is that true?

MR. ROBINSON of Arkansas: That is true.

MR. SWANSON: Consequently, it is left entirely to the States to determine in what manner intoxicating liquors shall be sold or used and to what places such liquors may be transported. Is that established definitely under Section 2 of the proposed amendment?

MR. ROBINSON of Arkansas: I think that is true. (p. 4225)

Finally, Senator Tydings read into the record an editorial apparently expressing his views to the effect that the only effect of Section 2 was a rewriting of the Webb-Kenyon Act, permanent in form:

"* * * The only proviso is a restatement of the Webb-Kenyon law, already on the law books, which would write into the Constitution the right of the dry States to have Federal protection against importation of liquor." (p. 4228)

Senator Glass' motion to substitute his Resolution for S. J. Res. 211 was defeated (p. 4230) and the latter Resolution was passed by the Senate, February 16, 1933. (p. 4231)

3. *Debate in the House*

On February 20, 1933, the Resolution, as passed by the Senate, was submitted to the House. The discussion there, whether in the course of the debate or in the extension of remarks, indicates that the Representatives looked upon Section 2 merely as a protection for dry States:

MR. EATON of Colorado: Mr. Speaker, in the last election, in both political parties, there was absolutely no dispute or debate on two propositions. One was the prevention of the return of the saloon and the other was the protection of dry States against wet States. (p. 4512)

MR. MCLEOD: Mr. Speaker, to-day the House of Representatives, for the second time this session of Congress, is afforded the opportunity to vote on re-

pealing the Eighteenth Amendment. On the first day of the present session we repealists in the House lacked only six votes of the two-thirds necessary, while to-day, with the additional impetus afforded by the Senate's favorable action last week, together with the added section of protection for dry States, every conceivable objection, in my opinion, is now squarely met." (p. 4517)

MR. GARBER: Section 2 prohibits the transportation or importation of intoxicating liquors for delivery or use into any of the several States where the laws of the States prohibit such. This section, it is claimed, will protect the dry States. If the resolution is adopted and intoxicating liquors are again legalized, Section 2 will prove unavailing in protecting the dry States. Bootlegging from the wet States into the dry States will be increased tenfold. (p. 4519)

MR. GIBSON: It provides protection for dry territory.

I feel that one of the strongest elements in this measure is the feature which gives to each State the right to regulate its own liquor traffic free from wet States' interference or so-called regulation by the present Government's discredited prohibition service. It will aid and protect the so-called dry States in permitting them to exclude, if their citizens so wish, all liquor traffic in their domains. (p. 4526)

MR. MCSWAIN: The proposal voted on today gives to every State absolute power to control the manufacture, sale and transportation of alcoholic and intoxicating beverages. It will be up to the people of every State to say whether or not they will permit any intoxicating beverages to be sold or transported or stored in each such State, and if they, by their State laws, prohibit such manufacture, sale, and transportation within the State, then, such State laws will be supreme on that question, and whiskies can not be shipped into, or transported into such State; and, if laws prohibiting such importation and transportation of intoxicating beverages are violated by common carriers, or by private individuals, then State courts, and

State juries must try, and convict, and punish all such violations. (p. 4523)

The Resolution was passed, without amendment, in the House on February 20, 1933. (p. 4516)

APPENDIX B

PUBLIC OPINION

on

Section 2 of the Twenty-first Amendment

1. *Political Platforms, 1932.*

Democratic Platform, 1932. "We advocate the repeal of the Eighteenth Amendment.

"To effect such repeal we demand that the Congress immediately propose a constitutional amendment to truly representative conventions in States called to act solely on that proposal; we urge the enactment of such measures by the several States as will actually promote temperance, effectively prevent the return of the saloon and bring the liquor traffic into the open under complete supervision and control by the State.

"We demand that the Federal Government effectively exercise its power to enable the States to protect themselves against importation of intoxicating liquor in violation of their laws."

Republican Platform, 1932. "We, therefore, believe that the people should have an opportunity to pass upon a proposed amendment the provisions of which, while retaining in the Federal Government power to preserve the gains already made in dealing with the evils inherent in the liquor traffic, shall allow States to deal with the problem as their citizens may determine, but subject always to the power of the Federal Government to protect those States where prohibition may exist and safeguard our citizens everywhere from the return of the saloon and attendant abuses."

2. *Editorial Comments.*

New York Times, February 17, 1933, Editorial. "The second section maintains, constitutionally, the protection of States which wish to remain Dry from importation of

intoxicating liquors from other States." (Page 18, Column 2)

Christian Science Monitor, Boston, February 17, 1933. "As passed by the Senate yesterday, the resolution now before the House has only one qualification to the so-called 'naked repeal' proposal * * * This is Section 2, which would put into the Constitution the essence of what is now statutory law under the Webb-Kenyon Act, directing our Federal Government to prohibit importation of liquor into dry States." (Page 3, Column 3)

Daily News (N. Y.), February 18, 1933, Editorial. "The repeal measure passed by the Senate is satisfactory because it doesn't contain the no-more-saloon and other riders with which dry Senators tried to make it a repealer that wouldn't repeal. The only sop it does throw to the drys is a clause guaranteeing dry States Federal protection against wet States—a foolish because unnecessary clause, but not a harmful one in itself." (Page 12, Column 1)

New York Herald Tribune, February 17, 1933, Editorial. "The Democratic platform called for naked repeal 'and the Senate resolution appends a clause which would incorporate in the Constitution the provisions of the Webb-Kenyon Act.' But the difference is not worth a quarrel." (Page 14, Column 1)

Boston Evening Transcript, December 4, 1933, Current Comment—from the Hartford Courant: "The States are free to regulate liquor; but the Federal Government does intend to exercise such oversight over the entire liquor traffic as will protect dry States in the right of choice. All this is in conformity with the Webb-Kenyon and the Reed Bone-Dry Acts which ante-dated the Eighteenth Amendment.' " (Part 2, Page 3)

3. *Lay Comment.*

New York Times, December 5, 1933—by Arthur Krock:

Observing that some repeal leaders did not like the Federal control that was being imposed: They thought "they had sent the liquor question back to the States. The victorious candidates had run on such a platform. Most critics of prohibition had agreed that its chief defect was implicit in the attempt to regulate Federally * * * The Webb-Kenyon Law and the Reed Amendment are to be in force after repeal, and these offer all possible Federal protection to the dry States against the importation of liquor." The basic philosophy that it is the responsibility of the general government to regulate the liquor traffic "is antithetic" to the belief of many leaders in the repeal movement "that the vote of the people was to send the problem back to the States, limiting Federal supervision to what it was prior to 1917."

New York Herald Tribune, December 1, 1933—Column by Walter Lippmann: "the Twenty-first Amendment does not merely repeal the Eighteenth. It contains a second section which prohibits the importation or transportation of liquor into any State where the effect would be to violate the laws of that State. This prohibition has to be enforced by the Federal Government." (Page 17, Column 1)

The Deseret News, Salt Lake City, Utah, February 17, 1933, Daily Feature Column by David Lawrence—discussing the "compromise" nature of the Senate resolution: "The extreme wets, who argued against inclusion of the clause, protecting dry States with constitutional power, contended that existing Federal law would be sufficient. The dry State defenders declared, however, that it was not desirable to remain under the whim of a majority of Congress * * * with a constitutional prohibition, they feel that they are protected with the full force of the Constitution and that, irrespective of majority rule of Congress they can invoke Federal protection." (Page 4)

New York World-Telegram, December 4, 1933—Feature article by Wm. Engle, "Looking in the Glass After 13

Years": "The Twenty-first Amendment not only repeals the Eighteenth but contains a section which prohibits the importation or transportation of alcoholic beverages into any State where the effect would be to break that State's laws.

"Just how the Government is going to do this, under the Webb-Kenyon Act now going back into effect, with a dry force cut to 700 men, is not clear." (Page 21)

New York Herald Tribune, February 17, 1933—Comment by Dr. Nicholas Murray Butler: "The section which writes the Webb-Kenyon Act into the Constitution is unnecessary and probably harmful, but it is not important enough to fight about." (Page 7, Column 2)

New York Times, February 21, 1933—Statement by Mrs. Ella A. Boole, World President, W. C. T. U.: "The repeal amendment, if ratified, will return conditions as they were before the Eighteenth Amendment was adopted, with the wets largely in charge of legislation to be enacted by the States." (Page 10, Column 1)

New York Sun, February 17, 1933—Formal statement issued by Representative Beck, of Pa., reprospective House action on repeal: "Happily the repeal amendment as now passed removes all our objections. Its present form agrees without consistent policy for an outright repeal which would completely restore home rule to the States in this matter.

"Personally I can see no objection to the constitutional guarantee that the dry States should be protected by Federal power, for such power would exist in any event under the commerce clause of the Constitution." (Page 2, Column 6)

4. *Comment in Legal Periodicals.*

25 California Law Review 718 (1937), Comment—Intoxicating Liquors in Interstate Commerce: "Had the Twenty-

first Amendment simply repealed the Eighteenth, intoxicating liquor would have been restored, unless and until Congress acted to the contrary, to its status under the Wilson, Webb-Kenyon and Reed Acts. * * * To remove any doubt as to possible repeal by implication, Congress reenacted all three measures. The Twenty-first Amendment not only repealed the Eighteenth, but enacted into the Constitution substantially the provisions of the Webb-Kenyon Act. Section 2 of the Twenty-first Amendment reads * * * " (Page 724)

21 Cornell Law Quarterly 504 (1936)—State regulation of importation of intoxicating liquor under Twenty-first Amendment: "During the whole period of National prohibition, it was recognized that the right of the State to exercise its police power on liquor shipped in interstate commerce was derived from the Webb-Kenyon Act which remained in effect throughout that period. The repeal of Federal prohibition left the Act unimpaired. However, since this was merely a Congressional Act, there was a possibility of it being changed at any time by a majority vote of Congress. Likewise there was the danger that the Supreme Court would overrule the Clark case. To insure its permanence the provisions of the Webb-Kenyon Act were incorporated into the Twenty-first Amendment." (Page 510)

28 Illinois L. Rev. 950 (1934), Note—Some Legal Aspects of the Repeal of the Eighteenth Amendment: "The Webb-Kenyon Act, which prohibits shipment of intoxicating liquor into any State in violation of laws of such State is in fact re-enacted into Section 2 of the Twenty-first Amendment, so there is no question as to its legality." (Page 954)

35 Michigan Law Review 1006 (1937), Case Note on Board of Equalization Case—[Discussing Webb-Kenyon Act]: "The desire of its proponents to have this Act made permanent and to prevent its being subjected to possible invalidity by a later court decision was one of the main

factors which led to its elevation into the Constitution as part of the Twenty-first Amendment." (Page 1008)

15 New York University L. Q. R. 210, 418 (1938), Johnson & Kessler, The Liquor License System: "The substitution of the Twenty-first Amendment for the Eighteenth has left unimpaired the reserved powers of the States to regulate the liquor traffic. The embodiment of the Webb-Kenyon Act in substance into the second section of this new Amendment has effected a pro tanto repeal of the interstate commerce clause with respect to liquor."

83 University of Pennsylvania Law Review 510 (1935), A Comparative Survey of Post-Repeal Liquor Legislation: "The Twenty-first Amendment not only repeals the Eighteenth Amendment but also provides for protection of the dry States in the following terms • • • [Section 2]. The inability of the dry States effectively to enforce their dry laws because of lack of power to control interstate shipments was long a source of much agitation before National prohibition. The language of the Twenty-first Amendment, however, merely confirms the State of the law at the time National prohibition went into effect since the Webb-Kenyon Act enacted in 1913 by Congress had divested liquor of its interstate character." (Page 510, Note 2)

7 So. Calif. L. R. 230 (1934), Case Note—"In Order to safeguard the privileges conferred on the States under the Webb-Kenyon Act and the Reed Amendment, the Twenty-first Amendment, Section 2, transposes from a mere statutory provision into a constitutional amendment the principle that shipment of intoxicating liquors into a 'dry' State is illegal." (Page 232)

15 Texas Law Review 255 (1937), Case Note discussing *State Board of Equalization v. Young's Market Co.*: "Section 2 of the Twenty-first Amendment, forbidding importation of intoxicating liquors into any State in violation

of the laws thereof, was not meant to enlarge the States' powers beyond those given by the Webb-Kenyon Act, but to secure them should the *Clark Distilling Case* be reversed or the Act repealed." (Page 256)